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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON
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7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 vs.

10 RAFAEL RAMIREZ-MACIAS,

11 Defendant.
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)
) No. CR-13-0059-JLQ

) MEMORANDUM OPINION RE:
) SENTENCING GUIDELINE
) CALCULATION

13 The matter before the court at sentencing on the charge of being an alien in the
14 United States after deportation was the Defendant's objection to the Guideline
15 Calculation contained in the Presentence Investigation Report. Specifically, based upon
16 *Descamps v. United States*, defense counsel alleged the Report erred in its application
17 of a 12-level Offense Level enhancement pursuant to U.S.S.G § 2L1.2(b)(1)(A)(i) based
18 upon the Defendant's May 19, 1989 Fresno County conviction for the sale of cocaine
19 under California Health & Safety Code § 11352. The Government contended that statute
20 is divisible and the modified categorical approach allows the court to utilize state court
21 documents furnished to the court to determine that the Defendant's Fresno conviction
22 qualifies as a "drug trafficking offense."

23 **1. Legal Framework**

24 U.S.S.G. 2L1.2(b)(1)(A)(i) provides for a 12-level Offense Level enhancement if
25 the Defendant was previously deported after a conviction for a "felony...a drug
26 trafficking offense" for which the sentence imposed was greater than 13 months, but the
27 defendant did not receive criminal history points. "Drug trafficking offense" is defined

1 in Application Note 1(B)(iv) as a law that "prohibits the manufacture, import, export,
2 distribution, or dispensing of, or offer to sell a controlled substance...or the possession
3 of a controlled substance...with intent to manufacture, import, export, distribute or
4 dispense." The definition of the term "controlled substance" as used in this definition
5 means "those substances listed in the Controlled Substances Act." *U.S. v. Leal -Vega*,
6 680 F.3d 1160 (9th Cir. 2012), *cert denied*, 133 S.Ct. 982 (Jan. 22, 2013).

7 To determine whether a conviction under California Health and Safety Code §
8 11352 meets the requirements for this 12-level Offense Level enhancement under the
9 Sentencing Guidelines, the court first uses the categorical approach set out in *Taylor v.*
10 *U.S.*, 495 U.S. 575, 598 (1990) and *Shepard v. United States*, 544 U.S. 13, 20 (2005).
11 *United States v. Becker*, 919 F.2d 568, 570 (9th Cir. 1990) (extending *Taylor's*
12 categorical approach to ACCA to the Sentencing Guidelines). The categorical approach
13 requires the sentencing court to compare (1) the statutory definition – “i.e., the elements”
14 of the Defendant’s prior offense of conviction; and (2) the definition of “drug trafficking
15 offense,” as stated in § 2L1.2. If the statute of conviction requires proof of all the
16 elements of what constitutes a drug trafficking offense, then the conviction is,
17 “categorically,” a drug trafficking offense. The “central feature” of the categorical
18 approach is “a focus on the elements, rather than the facts, of a crime.” *Descamps v.*
19 *United States*, 133 S.Ct. 2276 (June 20, 2013). The categorical approach prohibits the
20 court from “delving into the particular facts disclosed by the record of conviction, thus
21 leaving the court normally to ‘look only to the fact of conviction and the statutory
22 definition of the prior offense.’” *Shepard*, 544 U.S. at 17 (quoting *Taylor*, 495 U.S. at
23 602).

24 In limited circumstances, the court may modify the categorical approach and
25 consider specific documents. The modified categorical approach “serves a limited
26 function: It helps effectuate the categorical analysis when a *divisible* statute, listing
27 potential offense elements in the alternative, renders opaque which element played a part

1 in the defendant's conviction.” *Descamps v. United States*, 133 S.Ct. 2276 (2013). The
2 modified approach “has no role to play” if the prior conviction is predicated on a
3 nondivisible (or indivisible) statute, including statutes that are “missing elements” or
4 whose elements are “overbroad” in way that they could cover both qualifying and non-
5 qualifying conduct. *Id.* The Supreme Court’s rationale for this distinction is: “only
6 divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea
7 hearing) has convicted the defendant of every element of the generic crime.” *Id.*

8 **2. § 11352 does not categorically qualify as a “drug trafficking offense.”**

9 Section 11352(a) of the California Health and Safety Code provides as follows:

10 Except as otherwise provided in this division, every person who transports,
11 imports into this state, sells, furnishes, administers, or gives away, or offers to
12 transport, import into this state, sell, furnish, administer, or give away, or attempts
13 to import into this state or transport (1) any controlled substance specified in
14 subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054,
15 specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or
16 specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h)
of Section 11056, or (2) any controlled substance classified in Schedule III, IV,
or V which is a narcotic drug, unless upon the written prescription of a physician,
dentist, podiatrist, or veterinarian licensed to practice in this state, shall be
punished by imprisonment pursuant to subdivision (h) of Section 1170 of the
Penal Code for three, four, or five years.

17 A conviction under § 11352 does not categorically qualify as a “drug trafficking
18 offense” because 1) it criminalizes more substances than are included in the Controlled
19 Substances Act, *see USA v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012); and 2) the
20 federal term "drug trafficking offense" does not include "transportation of a controlled
21 substance for personal use and offers to transport, sell, furnish, administer, or give away
22 a controlled substance," *see United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir.
23 2005).

24 **3. § 11352 is Divisible**

25 The court’s analysis may proceed utilizing the modified categorical approach only
26 if the matter involves “a divisible statute, listing potential offense elements in the
27 alternative renders opaque which element played a part in the defendant’s conviction.”

1 *Descamps*, 133 S.Ct. 2276, 2283 (2013). A divisible statute is one whose statutory
2 language defines the elements "alternatively" and so "effectively creates several different
3 crimes," or otherwise stated, "comprises multiple, alternative versions of the crime"
4 where "[i]n a typical case...the prosecutor charges one of those two alternatives and the
5 judge instructs the jury accordingly." *Id.* at 2284.

6 By comparison, an "indivisible" or "non-divisible" statute "has a single,
7 indivisible set of elements" and does not contain "alternative elements," and *may*
8 criminalize "a broader swath of conduct." For example, *Descamps* held that a California
9 first degree burglary statute was nondivisible and was facially broader than the generic
10 definition of burglary because it did not require breaking and entering as an element of
11 the offense. Therefore "[b]ecause of the mismatch in elements, a person convicted under
12 that statute is never convicted of the generic crime." *Id.* at 2280. "[T]o determine whether
13 a statute contains alternative elements...a court may be required to look beyond the text
14 of the statute," for example, and "find cases concerning the correctness of jury
15 instructions..." *Id.* at 2301-2302 (Alito, J. dissenting).

16 Section 11352 is a divisible statute. First, the plain language of the statute
17 contains a single subsection listing potential offenses utilizing the disjunctive "or."
18 The California Supreme Court explained this construction of this statute in *People v.*
19 *Patterson*, 778 P.2d 549, 556 (1989):

20 In contrast, Health and Safety Code section 11352, the statute at issue here, has
21 no primary element. For instance, the elements of the crime of transporting a
22 controlled substance bear no resemblance to those underlying the offense of
23 administering such a substance; yet these two offenses are included in the same
24 statute...The fact that the Legislature has included a variety of offenses in Health
25 and Safety Code section 11352 does not require that we treat them as a unitary
26 entity. Rather, we must decide whether in "[r]eading and considering the statute
27 as a whole in order to determine the true legislative intent ... we find [a] basis for
28 severing" the various types of conduct it forbids. There are more than 100
different controlled substances that fall within the confines of Health and Safety
Code section 11352. To create statutes separately proscribing the importation,
sale, furnishing, administration, etc., of each of these drugs, would require the
enactment of hundreds of individual statutes. It thus appears that for the sake of
convenience the Legislature has included the various offenses in one statute.

Furthermore, both California case law and the California model criminal jury instruction establish that proof of a qualifying controlled substance and whether it was sold, etc is necessary to support a conviction. See CALJIC 12.01. Finally, other similarly constructed statutes have also been construed as divisible. See e.g., *Tolosa v. Holder*, 362 Fed.Appx. 833(9th Cir. 2010)(unpublished)(implicitly suggesting § 11352 of the California Health and Safety Code was a divisible statute); *Cabantac v. Holder*, 2013 WL 4046052 * 1 (9th Cir. Aug. 23, 2012)(per curiam)(*dissent*, commenting that “it appears that [California Health and Safety Code] § 11377(a) is a divisible statute...”); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028 (9th Cir. 2010)(treating California Health and Safety Code §11379 as divisible and noting that the court had “at least implicitly treated similar provisions” as divisible); *U.S. v. Gonzalez-Tejeda*, 2013 WL 4401381 (S.D.CA Aug. 15, 2013)(rejecting defense contention that a Washington statute, RCW § 69.50.401A, which enumerates groups of drugs in the disjunctive, was an indivisible, over broad drug statute which could never qualify as a drug trafficking offense).

4. Modified Categorical Approach

As the subject California statute is “divisible,” under *Descamps*, the modified categorical approach may be utilized to examine the record of the prior conviction to determine, if possible, which offense the Defendant was convicted of and what the elements of the offense were. The court considers only the limited class of documents approved by *Shepard* and the most recent cases construing *Shepard*. In this instance, the following are considered sufficiently reliable: the California state Change of Plea Waiver of Rights form signed by the Defendant, the Abstract of Judgment, and two Minute Orders from the change of plea and sentencing hearings demonstrate the Defendant pleaded to Count 2 of the Complaint. *Cabantac v. Holder*, 2013 WL 4046052, at *5 (9th Cir. Aug. 9, 2013) (per curiam)(“where, as here, the abstract of judgment or minute order specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment, we can consider the facts alleged in that count.”).

1 Count 2 of the Fresno criminal Complaint charged the Defendant with the sale/furnishing
2 of cocaine. Furthermore, the Change of Plea & Waiver of Rights form states that the
3 factual basis of the Defendant's plea was "POL RRP," which commonly means police
4 report. *See Parilla v. Gonzales*, 414 F.3d 1038 (9th Cir. 2005)(police report explicitly
5 incorporated into guilty plea as basis for charge, therefore a judicially noticeable
6 document for purpose of applying modified categorical approach). The police report
7 regarding Count 2 is specifically summarized in the state Report and Recommendation
8 of Probation furnished to the court. The police report stated that the Defendant sold
9 cocaine to a confidential informant.

10 Defendant's Fresno County 1989 conviction under California Health and Safety
11 Code § 11352 for the sale of cocaine meets the definition of a "drug trafficking offense,"
12 as defined by the U.S. Sentencing Guidelines. Accordingly, the Defendant's objection
13 to the application of the 12-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(i) is
14 **OVERRULED.**

15 IT IS SO ORDERED. The Clerk shall enter this Order and furnish copies to
16 counsel.

17 Dated this 29th day of August, 2013.

18 s/ Justin L. Quackenbush
19 JUSTIN L. QUACKENBUSH
20 SENIOR UNITED STATES DISTRICT JUDGE
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